Toffoloni v. LFP Publishing Group, LLC Doc. 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrarix and Personal Representative of the ESTATE OF NANCY E. BENOIT,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. 1:08-CV-0421-TWT
LFP PUBLISHING GROUP, LLC, d/b/a Hustler Magazine, MARK SAMANSKY, an Individual, and other distributors and sellers of, Hustler Magazine, as Defendants X, Y, and Z,	)	
Defendants.	)	

DEFENDANT LFP PUBLISHING GROUP, LLC'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Fed. R. Civ. P. 56 and LR N.D.Ga. 56.1B, Defendant LFP Publishing Group, LLC ("LFP") hereby submits its response to Plaintiff's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried:

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I. RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

(1)

Plaintiff is the personal representative of the Estate of Nancy E. Benoit, who died intestate in Fayette County, Georgia in June of 2007. See Verified Complaint ¶ 1.

RESPONSE: Because LFP has not yet obtained any discovery from Plaintiff, LFP does not yet know whether this assertion is true, or should be disputed. Pursuant to Rule 56(f), LFP intends and requests the opportunity to obtain discovery from Plaintiff and others to establish with certainty whether Plaintiff in fact owns the rights to pursue her asserted claim for right of publicity on behalf of decedent Nancy Benoit. LFP incorporates herein, in full, its Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment as to Liability and, In the Alternative, Rule 56(f) Motion for an Extension of Time to Respond to Plaintiff's Summary Judgment Motion ("LFP Opposition Brief") and the Affidavit of S. Derek Bauer, Esq. ("Bauer Affidavit"), filed contemporaneously herewith.

(2)

Defendant LFP Publishing Group, LLC is the publisher of "Hustler Magazine." See Answer of Defendant LFP Publishing Group, LLC ¶ 2.

RESPONSE: This fact is admitted and undisputed.

(3)

Defendant published nude and partially nude images (the "images") of Nancy E. Benoit in its "March 2008" edition. See Answer ¶ 8.

RESPONSE: This fact is admitted and undisputed.

(4)

At no time has Defendant ever sought or obtained the permission of Nancy E. Benoit or the Estate of Nancy E. Benoit to publish for commercial purposes the images of Nancy E. Benoit. See Verified Complaint, Exhibits A, B, C, and D.

RESPONSE: This fact is admitted and undisputed. However, LFP shows through the LFP Opposition Brief and Bauer Affidavit that the question of whether Plaintiff is in fact the owner of the right she asserts on behalf of the Estate of Ms. Benoit remains unresolved and unproven, as does the question of whether Ms. Benoit did not license, release or otherwise convey rights to the images of Ms. Benoit at issue to Defendant Samansky or another individual or entity. Both of these unresolved questions are material and preclude Plaintiff's request for entry of summary judgment as to liability against LFP.

(5)

At no time has the Defendant ever compensated Nancy E. Benoit or the Estate of Nancy E. Benoit for the use, for commercial purposes, of the images of Nancy E. Benoit. See Verified Complaint, Exhibits A, B, C, and D.

RESPONSE: This fact is admitted and undisputed.

II. LFP'S LR 56.1B.(2)(b.) STATEMENT OF ADDITIONAL FACTS WHICH ARE MATERIAL AND PRESENT A GENUINE ISSUE FOR TRIAL

(1)

Whether Plaintiff is the owner of the right to exploit Ms. Benoit's image and likeness, including the specific images of Ms. Benoit published by LFP, and is therefore the real party in interest.

(2)

Whether the images published by LFP were or are intended for commercial exploitation by Ms. Benoit or Plaintiff.

(3)

Whether under the actual facts and circumstances to be proven, LFP's publication of the images of Ms. Benoit was for "commercial purposes," as that term is defined for purposes of the Georgia common law claim for right of publicity.

(4)

Whether LFP was unjustly enriched by its publication of the images of Ms. Benoit.

Respectfully submitted this 5th day of November, 2009.

/s/ S. Derek Bauer
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CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
S. Derek Bauer
Georgia Bar No. 042537

CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing **Response to Plaintiff's LR56.1B Statement of Undisputed Facts** via the CM/ECF system which will automatically send notification to Plaintiff's attorney of record, who is a participant in the CM/ECF system.

Respectfully submitted this 5th day of November 2009.

/s/ S. Derek Bauer
S. Derek Bauer

Attorney for Defendant
LFP PUBLISHING GROUP, LLC